Supreme Court, U.S.
FILED
OCT 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-510

In The

SUPREME COURT OF THE UNITED STATES

October Term 1989

LARRY R. MEACHUM, COMMISSIONER,
CONNECTICUT DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

WAYNE B. ALEXANDER,
Respondent.

-v-

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit Court of Appeals erred in ruling that the Connecticut State Police used James Papagolas as their agent to interrogate Wayne Alexander in custody in circumvention of his demand that counsel be present during questioning and thereby violated his Fifth Amendment rights as explicated in Miranda and its progeny.

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LIST OF PARTIES

Wayne Alexander is the Respondent in this action. Throughout the pendency of this case until this juncture his party-opponent has been designated the "State of Connecticut." Larry R. Meachum, Commissioner of the Connecticut Department of Corrections, has undertaken to petition this Court for a Writ of Certiorari on behalf of the State of Connecticut and hence is denominated the Petitioner in this action. For ease of reference, Mr. Alexander will simply refer in his response to the Certiorari Petition to "Connecticut" to indicate the Petitioner.

OPINIONS BELOW

Wayne Alexander agrees with Connecticut's recitation of the opinions below and as set forth in the Appendix to Connecticut's Certiorari Petition.

JURISDICTION

Wayne Alexander agrees with Connecticut's statement of jurisdiction.

STATEMENT OF THE CASE

A. Case History Statement

On September 17, 1979, Wayne Alexander was indicted by a Connecticut grand jury for the crime of murder. The indictment alleged that on or about the 6th day of February, 1979, Wayne Alexander intentionally caused the death of Vern Alan Cook, in violation of Conn. Gen. Stat. § 53a-54a. Wayne Alexander pleaded not guilty and elected to be tried by a jury.

On May 15, 1980, the Honorable Joseph F. Dannehy of the Connecticut Superior Court denied Wayne Alexander's Motion to Suppress alleged jailhouse confessions made to James Papagolas following an evidentiary hearing.

Wayne Alexander was tried before a jury. The prosecution's principal witness was James Papagolas. On July 2, 1980, the jury returned a verdict of guilty of murder. On July 11, 1980, the court sentenced Wayne Alexander to a term of imprisonment of twenty-five years to life. From that judgment, rendered on the jury's verdict, Wayne Alexander appealed. Included in said appeal was Judge Dannehy's ruling on the admissibility of alleged confessions.

The Connecticut Supreme Court decided the appeal in a decision published at 197 Conn. 180 and 496 A.2d 486 on August

6, 1985. A copy of that decision is annexed to Connecticut's Certiorari Petition as Appendix A. The issues relating to the methods used to obtain alleged confessions from Wayne Alexander by James Papagolas were resolved adversely to him.

Wayne Alexander then filed a federal petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, claiming that (1) his implicit Fifth Amendment right to counsel (2) was violated by the Connecticut State Police through their use of James Papagolas to elicit incriminating statements from him. The petition was docketed to the Honorable Peter C. Dorsey, United States District Judge for the District of Connecticut. Judge Dorsey referred the matter to United States Magistrate Thomas P. Smith for a recommended ruling. The Office of the Federal Public Defender for the District of Connecticut was appointed under the Criminal Justice Act to represent Mr. Alexander.

Magistrate Smith heard oral argument on April 12, 1988. Counsel for the State of Connecticut conceded at that oral argument that although the Connecticut Supreme Court construed the evidence, it made no findings of fact relative to the suppression hearing. Put differently, Connecticut conceded that the Magistrate should engage in an independent non-deferential plenary review of the record of the suppression hearing. Magistrate Smith, thereafter, recommended to Judge Dorsey that he find that Mr. Alexander had an implicit Fifth Amendment right

to counsel but that it was not violated because, in his view, James Papagolas never became an agent or instrumentality of the State police. A copy of the Magistrate's recommended ruling is annexed to Connecticut's Certiorari Petition. Wayne Alexander objected. Judge Dorsey adopted the Magistrate's recommended ruling with the modification that Mr. Alexander was found to have exhausted his state remedies. Mr. Alexander thereafter requested and obtained a Certificate of Probable Cause to appeal pursuant to 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 22(b), from Judge Dorsey's ruling.

Wayne Alexander, through the Office of the Federal Public Defender for the District of Connecticut, filed a timely appeal of Judge Dorsey's ruling in the Second Circuit Court of Appeals. The Second Circuit (Lumbard, Van Graafeiland and Altimari, Circuit Judges) heard oral argument on November 10, 1988, and rendered an opinion on May 5, 1989. Said opinion is officially reported at 876 F.2d 277 and a copy is annexed as Appendix A to Connecticut's Certiorari Petition. In that opinion, the panel unanimously reversed the judgment of the District Court and remanded, "for entry of an order granting the writ and the release of Alexander on the murder charge, unless he is retried within a reasonable time."

The State of Connecticut filed a petition for rehearing with the Second Circuit Court of Appeals but not a suggestion

for rehearing en banc. The panel denied the petition for rehearing by an order entered June 28, 1989. The State of Connecticut thereafter filed a Petition for a Writ of Certiorari with this Court seeking review of the judgment and opinion of the Second Circuit Court of Appeals.

B. Statement of Facts

Wayne Alexander is in substantial agreement with the facts as stated by the Second Circuit Court of Appeals as reported at 876 F.2d 277 and at pages A-1 to A-15 of Connecticut's Certiorari Petition. The following summary reflects in chronological order the pertinent events of this case.

Chronology

1.

(3/9/79) State Police confront Wayne Alexander regarding Vern Cook. Wayne Alexander admits committing arson with Vern Cook but denies killing him. State Police arrest Wayne Alexander for arson and take him to jail. En route to jail, State Police learn that Wayne Alexander and Vern Cook have a mutual friend in James Papagolas.

2.

(3/14/79) State Police visit James Papagolas. They tell James Papagolas that Vern Cook is believed dead, and they and they ask James Papagolas if he plans on visiting Wayne Alexander in jail. James Papagolas says yes

and tells them that he will let them know if he learns anything about Vern Cook.

3.

(3/15/79) James Papagolas calls the State Police to report that Wayne Alexander's wife told him that Wayne Alexander might have a gun in his car.

4.

(3/16/79) State Police meet James Papagolas, who tells them that he found .38 caliber bullets in Wayne Alexander's car.

5.

(3/17/79) Wayne Alexander's attorney, having learned that the State Police had been to the jail in an effort to question him further, calls the State Police to notify them formally that Mr. Alexander does not want to talk with them in the absence of counsel.

6.

(3/19/79) James Papagolas visits Wayne Alexander in jail. He drives his own car; he does not notify the State Police in advance of his visit. He asks "for my own peace of mind" if Wayne Alexander killed Vern Cook and Wayne Alexander says yes.

7.

(3/19/79) (cont'd) After Wayne Alexander admits killing Vern Cook, visiting time ends and Wayne Alexander asks James Papagolas to return. James Papagolas calls and meets with the State Police. He describes his morning visit in detail and tells the officers that he is confident that he can get Wayne Alexander to reveal the location of Vern Cook's body. The State Police thereupon drive James Papagolas back to the jail for that purpose. James Papagolas "pumps" Wayne Alexander but to no avail. On the return ride, James Papagolas describes his efforts and their lack of success to the State Police.

8.

(3/20/79) The State Police drive James Papagolas back to the jail and wait while he visits Wayne Alexander. James Papagolas reports back, on the return ride, that he offered to put lime on Vern Cook's body as a ruse to learn its location but Wayne Alexander did not take the bait.

9.

(3/21/79) James Papagolas receives word that Wayne Alexander wants to see him.

10.

(3/22/79) James Papagolas calls the State Police, who drive him to the jail and wait while he visits Wayne Alexander. When James Papagolas returns, he informs the waiting officers that he has finally inveigled the location of Vern Cook's body and leads them to it.

ARGUMENT

A. The Issue Presented In This Case Is Fact-Bound And Not Worthy of This Court's Review

Connecticut asserts that in this case the Second Circuit Court of Appeals has decided an important question of law which has not been, but should be, settled by this Court. Wayne Alexander respectfully disagrees because the Second Circuit Court of Appeals did not announce new law but rather applied established legal principles to the particular facts of this case.

Connecticut's position with the Second Circuit Court of Appeals was limited to the assertion that Wayne Alexander was

not "interrogated" by the "police". Connecticut never challenged the proposition that if Wayne Alexander was "interrogated" by the "police" such would have violated his Fifth Amendment rights. Thus, the inquiry by the Second Circuit Court of Appeals was whether the police used James Papagolas as their agent or instrumentality to interrogate Wayne Alexander in custody in circumvention of his demand that counsel be present during questioning.[1]

According to generally accepted principles of law that are not contested in this case, two critical factors in the "instrument or agent" analysis are: (1) the extent of knowledge and acquiescence by the police and (2) the intent of the private

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[1] Connecticut conceded at oral argument before the Magistrate that the Connecticut Supreme Court made no findings of "fact", as that term is defined in Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963), that would act under 28 U.S.C. §2254(d) to preclude independent non-deferential plenary federal review. The Magistrate conducted such a review of the record and recommended a ruling that was adopted by the District Court Judge. Connecticut argued on appeal to the Second Circuit that case law founded on Federal Rule of Civil Procedure 52 created a clearly erroneous standard of review of the District Court's decision. That position was presumably rejected because the District Court conducted no evidentiary hearings. Connecticut for the first time sought to invoke 28 U.S.C. §2254(d) in its Petition For Rehearing, which was summarily denied. Connecticut now seeks to complain to this Court with the appearance of earnest dismay that the decision of the Second Circuit, "provided no explanation of why... 28 U.S.C. §2254 should not apply...." The answer, had the question been properly preserved and presented, would be that no presumption of correctness attaches to State Court findings that involve mixed questions of law and fact. Cuyler v. Sullivan, 446 U.S. 335 (1980).

party. James Papagolas testified as follows at the suppression hearing:

> Q So, in other words, it is your testimony that it was soley [sic] your curiosity that prompted you to go in and keep getting information from Wayne?
>
> A Curiosity, and once I found out what he told me, that he killed him, then it was just a needless, senseless thing to do and I wanted him to go to jail.
>
> * * *
>
> Q All right. Now once Wayne had told you that he had killed Vern Cook what was your attitude?
>
> A I was no longer interested in him being my friend then. . . . He stopped being my friend from then, and from then on I was soley [sic] interested in him doing his time for that.

That testimony dovetailed into his other testimony:

> Q Did Sergeant Jaciewicz, in fact, ask you to go back to the jail and get more information from Wayne Alexander?
>
> A Yes, he did.
>
> Q He didn't say to you if you are going back and get any more information will you notify us. He specifically asked you?
>
> A He also said that at times too.
>
> Q But at that time he specifically asked you to go back to the jail and get information from Mr. Alexander, is that correct?
>
> A Would I go back and get more, yes, right.

The Second Circuit Court of Appeals considered that testimony, in the context of the other facts of this case and in light of

standard legal principles not challenged by Connecticut, in the course of deciding that, by the time James Papagolas inveigled the location of Vern Cook's body, there was an adequate basis to find the existence of an implied agency relationship between James Papagolas and the police. No new law was created or announced in the process of reaching that fact-based conclusion.

B. The Decision of The Second Circuit Court of Appeals In This Case Is Not in Conflict With Any Other Circuit Court of Appeals

Connecticut does not seek a review on writ of certiorari by this Court based on any assertion that the decision of the Second Circuit Court of Appeals in this case is in conflict with any other decision by another federal court of appeals. In point of fact, the Second Circuit has previously held, in United States v. Willoughby, 860 F.2d 15 (1988), that questioning of an inmate by an undisclosed police agent does not constitute per se custodial interrogation for Miranda purposes; that the questioning must occur in an atmosphere of coercion in order to constitute custodial interrogation. Consistent with Willoughby, the Second Circuit in the case at bar found, based on the particular facts of this case, that a coercive atmosphere existed when James Papagolas questioned Wayne Alexander regarding the location of Vern Cook's body. Connecticut's

Petition For Rehearing to the Second Circuit made no claim that the decision in the case at bar conflicts with Willoughby. Moreover, Connecticut never suggested en banc review to the Second Circuit to resolve any purported conflict between Willoughby and this case. Such a contention would have been unavailing because the dispute in this case was not over controlling legal principles but rather the application of well-settled law to the particular facts of this case.

C. The Second Circuit's Decision Is Not Based On The Law As Found in Illinois v. Perkins

This Court has accepted certiorari review in Illinois v. Perkins, No. 88-1972, to review a decision by the Appellate Court of Illinois that an incarcerated suspect is per se subjected to "custodial interrogation" whenever he is questioned by an undisclosed police agent, even in the absence of coercion beyond the mere fact of his confinement. That issue is not present in this case because of the standard applied by the Second Circuit Court of Appeals in the case at bar. As previously mentioned, in this case the Court explicity found, based on the facts of this case, that there were coercive circumstances beyond the mere fact of incarceration. See, e.g., 876 F.2d at 283 ("Alexander also points to several factors

beyond his incarceration that increased his sense of coercion."). This Court granted certiorari in Perkins to determine which standard is correct. Even if this Court determines that the Second Circuit standard is too high because the Illinois per se standard is correct, application of the Illinois per se standard would result in the same ruling by the Court.

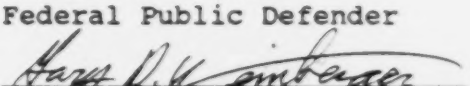
CONCLUSION

The decision of the Second Circuit Court of Appeals that the Connecticut State Police used James Papagolas as their agent to interrogate Wayne Alexander in custody in circumvention of his demand that counsel be present during questioning and thereby violated his Fifth Amendment Rights as explicated in Miranda and its progeny is a fact-bound determination that is not in conflict with any other Circuit Court of Appeals and represents the application of a legal standard that, if anything, was higher than necessary to be consistent with the Constitution as previously interpreted by this Court. Wherefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Thomas G. Dennis
Federal Public Defender

Dated: October 26, 1989

By 
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